

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
January 28, 2008 Session

DELORES YOUNG v. VANDERBILT UNIVERSITY

**Direct Appeal from the Chancery Court for Davidson County
No. 05-2209-II Carol L. McCoy, Chancellor**

**No. M2007-00586-WC-R3-WC - Mailed - May 1, 2008
Filed - August 25, 2008**

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tennessee Code Annotated section 50-6-225(e)(3) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law. On appeal, the employer contends that the trial court erred by basing the employee's impairment rating on the testimony of the independent medical examiner instead of on the employee's treating physician. Because the evidence does not preponderate against the trial court's findings, we affirm the trial court's judgment.

**Tenn. Code Ann. § 50-6-225(e) (Supp. 2007) Appeal as of Right;
Judgment of the Chancery Court Affirmed**

DONALD P. HARRIS, SR. J., delivered the opinion of the court, in which CORNELIA A. CLARK, J., and JERRY SCOTT, SR. J., joined.

Raymond S. Leathers, Nashville, Tennessee, for the appellant, Vanderbilt University.

Stanley A. Davis, Nashville, Tennessee, for the appellee, Delores Young.

MEMORANDUM OPINION

Factual and Procedural History

Delores Young was 50 years old at the time of trial. She has a tenth grade education and has no other technical or vocational training. Ms. Young's work history includes positions at the Country Music Hall of Fame for two or three years, at the Radisson Downtown for eight years, and at the Doubletree Downtown for four years. In each of these jobs, Ms. Young worked as a housekeeper.

In 1989, Ms. Young began working for Vanderbilt University as an environmental service technician, which she equated to a housekeeping position. On September 1, 2004, while working for Vanderbilt, Ms. Young was sent to the hospital's fifth floor to clean an area where patients' food trays are taken. As she was "pulling" trash from a receptacle, she heard a pop in her back. Ms. Young described the pain as feeling "like something was separating in [her] back" and likened it to having broken something.¹ Ms. Young continued to work but near the end of her shift, informed her supervisor that she heard a pop in her back while attempting to lift some trash and that her back hurt.² Ms. Young testified that she was limping as she left work that day and that she had right leg pain.

At the request of her supervisor, Ms. Young filled out an incident report the next day, September 2. Subsequently, Ms. Young went to "employee health," the on-site medical facility for Vanderbilt employees. "Employee health" treated Ms. Young with muscle relaxers, and she started a course of physical therapy. Ms. Young testified that the muscle relaxers and therapy did help in reducing the pain a little, but that the effects were temporary, lasting only two or three days.

At some point thereafter, Ms. Young selected Dr. Frank Berklacich from a panel of physicians offered in accordance with Tennessee Code Annotated section 50-6-204(a)(4) (1999). Dr. Berklacich testified by deposition. He first saw Ms. Young on November 8, 2004. During the visit, Ms. Young complained of pain in her lower back and right leg. Dr. Berklacich performed neurological testing and found that Ms. Young had normal strength in her legs and her reflexes were present and symmetrical. Her range of motion in the lumbar spine, however, was very limited due to her complaints of pain. Dr. Berklacich noted that Ms. Young was significantly overweight, being 5'10" and weighing 327 pounds. Dr. Berklacich ordered an MRI, which was performed on November 9, 2004. The MRI showed a slight disk bulge between L4 and L5. After reviewing the MRI, Dr. Berklacich determined that Ms. Young suffered from pre-existing degenerative joint disease consisting of facet arthropathy, a slight spondylolisthesis at L4-5, and a very slight neuroforaminal encroachment at L4-5. Dr. Berklacich also indicated in his office notes that these pre-existing conditions and her excessive weight could have caused her current back pain. Dr. Berklacich stated, however, that Ms. Young's account of how the injury occurred was consistent with his findings in the physical examination. Dr. Berklacich testified that he based his medical diagnosis on the fact that he found no weakness, sensory loss, or radiculopathy in Ms. Young's back, and there was no evidence of nerve root compression.

Following this diagnosis, Dr. Berklacich started Ms. Young on a treatment of epidural and facet injections.³ She had three epidural steroid injections during November and December of 2004. Ms. Young received only moderate relief from these injections, lasting for a day or two before her

¹Ms. Young testified that, prior to the incident on September 1, 2004, she had never had any back problems. The medical testimony did not contradict this statement.

²Both parties stipulated that proper notice was given in this case.

³These injections were provided by Premier Radiology.

back would start hurting again. On November 18, 2004, Ms. Young went on medical leave and has not returned to work.

Ms. Young saw Dr. Berklacich five more times in 2005. During each visit, Dr. Berklacich noted that there was no improvement in Ms. Young's condition and recommended physical therapy and weight loss.⁴ In June 2005, Dr. Berklacich ordered another MRI. Although the second MRI report mentioned a broad based disk bulge at the L4-5 level, Dr. Berklacich found no significant changes between the November 2004 MRI and the more recent one. Dr. Berklacich suggested that Ms. Young try a series of facet injections. On July 18, Ms. Young received her first, and only, facet injection. In a follow-up visit on August 11, Ms. Young told Dr. Berklacich that the injection did not help in reducing her pain. At this point, Dr. Berklacich placed Ms. Young at maximum medical improvement and instructed that she have a functional capacity evaluation, which was performed on December 21, 2005.

On August 29, 2005, Ms. Young filed this workers' compensation complaint, requesting that the court award her both temporary total and permanent disability benefits as a result of her September 1, 2004 injury. Vanderbilt answered the complaint, denying that Ms. Young suffered a work-related injury and asserting that the injury alleged in the complaint was a pre-existing condition and therefore not compensable.⁵

On December 21, 2005, Ms. Young was terminated by Vanderbilt because she had exhausted her available leave time and was unable to return to work. It was stipulated, at trial, that Ms. Young did not make a meaningful return to work and, as a result, the 2.5 times cap contained in Tennessee Code Annotated section 50-6-241(a)(1) did not apply.

On December 28, 2005, at the request of her attorney, Ms. Young saw Dr. C. M. Salekin. After taking a thorough history and performing a physical examination, Dr. Salekin noted finding mild weakness of the right quadriceps, weak dorsiflexion on the right side, decreased sensation on the right L4 dermatome, and decreased right knee reflex on the right as compared to the left. These physical findings had not been noted by Dr. Berklacich. Based on a review of the November 2004 MRI and his physical findings, Dr. Salekin diagnosed Ms. Young as having right L4 radiculopathy, spondylolisthesis, and anterolisthesis.⁶ Based upon the AMA Guides, Dr. Salekin assigned a 16%

⁴Dr. Berklacich also suggested that Ms. Young consider gastric bypass surgery as a way to reduce her weight. Ms. Young expressed interest in this option, but was unable to pay the co-pay required to have the surgery.

⁵At trial, however, both parties stipulated to compensability.

⁶Dr. Salekin defined "anterolisthesis" as a condition where one vertebral body moves forward in relation to another vertebral body so the supporting base becomes loose. And, as Dr. Salekin testified, if this progresses, there is a chance of the vertebral body injuring either the spinal cord or the nerve root.

impairment rating to the body as a whole.⁷ Dr. Salekin supported his rating with Ms. Young's complaints of pain, her functional capacity evaluation, her medical history, and the November 2004 MRI. Dr. Salekin testified that Ms. Young's condition could be corrected only by surgery, specifically stating that physical therapy and medication would do nothing to help her.

Ms. Young returned to Dr. Berklacich for a follow-up appointment on January 26, 2006. During this visit, Dr. Berklacich assessed a 5% impairment rating to the body as a whole based on DRE Lumbar Category II. In explaining why he used DRE Lumbar Category II, Dr. Berklacich testified that at no time during his physical examinations of Ms. Young did he find that she had weakness or sensory loss in her legs or back, and, therefore, she did not have radiculopathy. Dr. Berklacich assigned Ms. Young permanent restrictions of no lifting more than 20 pounds floor to waist, no lifting more than 20 pounds overhead, no pushing more than 30 pounds, no pulling more than 25 pounds, and no unilateral carrying more than 10 pounds.⁸ These restrictions were based on Ms. Young's functional capacity evaluation. In his deposition, Dr. Berklacich stated that Ms. Young's functional capacity evaluation revealed that she was "fairly limited in terms of her function." Dr. Berklacich, however, did not think that surgery was appropriate in her case because of Ms. Young's obesity.

The trial in this case occurred on January 25, 2007. After reviewing the medical depositions and listening to the testimony of the witnesses, the trial court determined that Ms. Young suffered a physical disability which prevented her from being employed at Vanderbilt. The trial court noted that Ms. Young had consistently worked her entire life and desired to return to work. Additionally, the trial court observed Ms. Young in the courtroom and noticed that she had difficulty sitting in her seat for prolonged periods of time and difficulty standing and walking. It was also noted by the trial judge that Ms. Young adjusted herself in her chair several times in order to try and get comfortable, and that she had "exceedingly red eyes, which would be consistent with somebody who doesn't get much sleep." From these observations and after considering Ms. Young's age, education, employable skills, local job opportunities, and the lay and expert testimony, see Tenn. Code Ann. § 50-6-241(b) (2005), the trial court determined that Dr. Salekin's impairment rating more accurately reflected Ms. Young's actual vocational impairment.⁹ Accordingly, the trial court assigned Ms. Young a 10% impairment rating and determined that she suffered a 60% permanent partial disability to the body as a whole. Vanderbilt has appealed, asking this Panel to determine whether the trial

⁷A DRE Lumbar Category III injury carries an impairment rating of 10-13%. In this instance, Dr. Salekin assigned a 13% impairment rating for the back injury but also added an additional 3% impairment because Ms. Young complained of an inability to sleep due to her chronic low back pain. See AMA Guides, pp. 317, "Arousal & Sleep Disorders: Class I."

⁸In his deposition, Dr. Salekin testified that he agreed with Dr. Berklacich's restrictions.

⁹In making this determination, the trial court stated, "I [gave] little or no consideration to . . . Dr. Salekin's evaluation of an impairment on the sleep disturbance" because Ms. Young had sleep apnea before the injury and this alone could cause Ms. Young's sleep disturbances.

court erred by basing its award on the testimony of the independent medical examiner, Dr. Salekin, rather than the testimony of Ms. Young's treating physician, Dr. Berklacich.

Standard of Review

We review factual issues in a workers' compensation case de novo upon the record of the trial court, accompanied by a presumption of correctness of the trial court's factual findings. See Tenn. Code Ann. § 50-6-225(e)(2) (2007); see also Rhodes v. Capital City Ins. Co., 154 S.W.3d 43, 46 (Tenn. 2004); Perrin v. Gaylord Entm't Co., 120 S.W.3d 823, 825-26 (Tenn. 2003). When the trial court has seen the witnesses and heard the testimony, especially where issues of credibility and the weight of testimony are involved, the court on appeal must extend considerable deference to the trial court's factual findings. Houser v. Bi-Lo, Inc., 36 S.W.3d 68, 71 (Tenn. 2001). This Court, however, may draw its own conclusions about the weight and credibility to be given to expert medical testimony when it is presented by deposition. Krick v. City of Lawrenceburg, 945 S.W.2d 709, 712 (Tenn. 1997). With these principles in mind, we review the record to determine whether the evidence preponderates against the trial court's findings.

Analysis

In this appeal, Vanderbilt has asked this Court to determine whether the trial court erred in relying on the medical testimony of Dr. Salekin, the independent medical examiner, instead of Dr. Berklacich, the treating physician, in determining Ms. Young's impairment. Vanderbilt contends that because Dr. Berklacich treated Ms. Young for nearly two years, as compared to only the one visit Ms. Young had with Dr. Salekin, the trial court should have given more weight to Dr. Berklacich's 5% impairment rating.

When testimony differs as to the extent of an employee's work-related injury, it is within the trial court's discretion to conclude that the opinion of one expert should be accepted over that of another expert. Hinson v. Wal-Mart Stores, Inc., 654 S.W.2d 675, 676-77 (Tenn. 1983). In so doing, the trial court is allowed, among other things, to consider the qualifications of the experts, the circumstances of their examination, the information available to them, Orman v. Williams Sonoma, Inc., 803 S.W.2d 672, 676 (Tenn. 1991), and the employee's age, education, training, job skills, work experience and available job opportunities. Miles v. Liberty Mut. Ins. Co., 795 S.W.2d 665, 666 (Tenn. 1990). Moreover, the "testimony of expert witnesses must be considered in conjunction with the employee's testimony as a lay witness." Williams v. Tecumseh Prods. Co., 978 S.W.2d 932, 935 (Tenn. 1998).

After reviewing the medical testimony and taking into consideration the trial court's observations of Ms. Young, we find that the evidence in this matter does not preponderate against the trial court's findings. Importantly, Dr. Salekin's medical opinion that Ms. Young's back injury should be classified as a DRE Lumbar Category III injury was a correct application of the AMA Guides. Included in the Guides, in table 15-3, the medical findings needed to determine a 10-13% impairment rating may include: "[s]ignificant signs of radiculopathy, such as dermatomal pain . . . , sensory loss, loss of relevant flex(es), [and] loss of muscle strength . . . compared to measurements

on the contralateral side at the same location.” In this instance, Dr. Salekin found that Ms. Young had radiculopathy, loss of relevant flexes and loss of muscle strength. Additionally, based on the its observations of Ms. Young, the trial court found that Dr. Salekin’s findings more accurately reflected Ms. Young’s actual impairment.

Although the duration of a doctor’s treatment of a patient can be an important factor in determining the weight of a doctor’s testimony regarding impairment, it is not the only factor. See e.g., Western Exp., Inc. v. Orlando, No. M2003-01533-WC-R3-CV, 2004 WL 1302476, at *1 (Tenn. Workers’ Comp. Panel June 14, 2004). To the contrary, the trial court, in this instance, correctly considered: (1) Ms. Young’s age, education, and employable skills; (2) her local job opportunities; (3) the doctors’ findings and how their findings compared to the trial court’s own observations of Ms. Young; (4) Ms. Young’s own testimony regarding her current back problems; and (5) the fact that, even though the doctors’ impairment ratings differed, both doctors properly adhered to the AMA Guides in assigning their respective impairment ratings. Based on all of these factors, we find that, even though we may not have assigned the same impairment rating as the trial court, the trial court’s impairment rating is supported by the evidence.

Conclusion

For the reasons stated, we find that the evidence does not preponderate against the trial court’s findings, and therefore, affirm the trial court’s judgment. Costs of this appeal are taxed to Vanderbilt University, for which execution may issue if necessary.

DONALD P. HARRIS, SENIOR JUDGE

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

DELORES YOUNG v. VANDERBILT UNIVERSITY

**Chancery Court for Davidson County
No. 05-2209-II**

No. M2007-00586-SC-WCM-WC - Filed - August 25, 2008

JUDGMENT ORDER

This case is before the Court upon the motion for review filed by Vanderbilt University pursuant to Tenn. Code Ann. § 50-6-225(e)(5)(B), the entire record, including the order of referral to the Special Workers' Compensation Appeals Panel, and the Panel's Memorandum Opinion setting forth its findings of fact and conclusions of law.

It appears to the Court that the motion for review is not well-taken and is therefore denied. The Panel's findings of fact and conclusions of law, which are incorporated by reference, are adopted and affirmed. The decision of the Panel is made the judgment of the Court.

Costs are assessed to Vanderbilt University, for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM

Cornelia A. Clark, J., not participating



Supreme Court
State of Tennessee

CHIEF JUSTICE
WILLIAM M. BARKER

JUSTICES

JANICE M. HOLDER
CORNELIA A. CLARK
GARY R. WADE
WILLIAM C. KOCH, JR.

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MEMORANDUM

TO: Sandra Vance, Deputy Clerk - Nashville

FROM: Justice Gary R. Wade

RE: Delores Young v. Vanderbilt University
(Davidson County Chancery, No. 05-2209-II)
Appeal No.: M2007-00586-SC-WCM-WC

DATE: August 19, 2008

APPLICATION FOR PERMISSION TO APPEAL: **Denied**

RELEASE DATE: **Next Available Date**

DISPOSITION OF RECORD: **Previously returned**